United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1498

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE and SUSAN LINFANTE,

Plaintiffs-Appellees,

—against—

L.P.W. REALTY COMPANY, LAWRENCE PAUL WOLF, GULF OIL CORPORATION, JOSEPH JAMES, INC. and JOSEPH JAMES,

Defendants-Appellees,

JOSEPH JAMES, INC.,

Defendant-Appellant,

GULF OIL CORPORATION,

Defendant and Third-Party Plaintiff-Appellee-Appellant,

—against—

BEAMAN CORPORATION,

Third-Party Defendant-Appellant,

UNITED PORCELAIN CO., INC.,

Third-Party Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF ON BEHALF OF APPELLANT BEAMAN CORPORATION

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BRIEF ON BEHALF OF APPELLANT BEAMAN CORPORATION

Issues

1. Whether the judgment to the extent that it granted Gulf Oil Corporation contractual indemnity was contrary to the law.

2. Whether the District Court erred in reversing the jury verdict holding United Porcelain Co., Inc. 30% at fault for the plaintiffs' accident and in dismissing Beaman Corporation's third-party complaint against United Porcelain Co., Inc.

3. Whether the District Court erred in dismissing Gulf Oil Corporation's cross-claim based upon contractual indemnification against Joseph James, Inc.

4. Whether the District Court erred in presenting issues to the jury on the subject of Beaman Corporation's common law indemnity liability to Gulf Oil Corporation.

5. Whether the evidence allowed for only total indemnity in favor of Beaman Corporation against United Porcelain Co., Inc.

6. Whether the District Court deprived this appellant of a fair trial by its errors in the charge to the jury.

Facts

At about 2:30 p.m. on June 28, 1966 (404a-405a)* James McLean and Joseph Linfante fell some ten to fifteen feet to the top of an ice machine when an overhang which they had installed and a section of the coping at the top of the Gulf service station to which it was attached gave way under them (405a-408a, 564a).

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* (Figures in parentheses refer to Joint Appendix).

L. W. Realty Company had originally constructed this service station on plans it submitted to Gulf Oil Corporation (hereinafter called Gulf) (216a). Gulf accepted the completed building (222a) on a lease of the entire premises (226a).

Pursuant to a blanket contract which Beaman Corporation (hereinafter called Beaman) had with Gulf (321a-322a), Beaman received a purchase order from Gulf on December 12, 1965 (279a, 326a, Plaintiffs' Exhibit "7") to furnish the material and install prefabricated porcelain siding on an overhang on the front and side of the subject Gulf station (260a, 266a, 324a-325a, 328a). The final modified order was sent by Gulf to Beaman on March 30, 1966 (279a-280a).

Beaman's contract proposal, upon which the Gulf contract was based and of which it was a part, specifically provided that Beaman was only to do field measurements. Likewise, that same document clearly stated that Gulf had sole responsibility to eliminate any structural obstructions to the work (Plaintiffs' Exhibit 7 & 8).

Gulf's construction engineer witness, Arnold E. Beckett (251a), admitted that the architect John Mitchell was hired by Gulf to prepare the plot and paving plans and secure the permits for this job (267a, 275a, 281a). Mr. Beckett stated that he supposed someone from Gulf looked at the plans before the work was let out (268a).

Beaman's witness, Howard Spencer, a graduate engineer, testified that the plans in Plaintiffs' Exhibit 7 were not prepared by Beaman but by architect Mitchell. However, Beaman did draw the blueprints therefrom and sent them to Gulf (647a-649a). The plans contain only the name and seal of Mitchell as their author. The blueprint has the printed name of Beaman on it, but it also bears the Mitchell signature and seal giving it its au-

thority. Gulf submitted the drawings to Beaman (332a-333a) as well as the plans and specifications (337a, 343a). Beckett, Gulf's engineer, testified that after Gulf received the work documents and plans he delivered them to Joseph James, Inc. (hereinafter called James), the franchise operator in possession of the service station, in April of 1966 before the work started (276a-277a, 280a). Beaman's engineer stated that after the engineering work was completed, Beaman would send a price estimate to Gulf and Gulf would send Beaman the purchase order according to established operating procedure (320a-323a). Beaman's engineer said that the plans did not call for any physical change or modification of the roof proper of the service station (319a, 328a). Gulf's engineer agreed that Gulf gave no instructions to Beaman other than those contained in plaintiffs' Exhibit "7" (274a-275a).

Spencer testified that Gulf had never in the past engaged Beaman to conduct an inspection of the premises before commencing the work (328a, 333a) and did not do so for this job (329a). When Gulf submitted the order, Beaman assumed the building was safe. It relied on Gulf to have made the necessary inspections to have determined that fact (334a, 342a-343a, 344a, 347a) and would expect to be advised by Gulf if there was any unsafe condition (345a). Therefore, Beaman only had the measurements made of the length and width of the building on the predetermined plans and specifications prepared by Gulf (333a, 337a, 651a) and made no efforts itself to determine if the building itself was structurally safe (334a, 661a).

It was admitted by all of Gulf's witnesses that no physical inspection had been made of this service station by Gulf for defects or unsafe or unusual conditions of the structure before the work order was released (240a, 256a,

260a, 261a-263a, 275a-276a, 277a, 304a) or during the course of the job (258a, 272a). One Gulf salesman testified that it was Gulf's responsibility to conduct such an inspection (240a). Another Gulf service representative testified that Gulf had engineers in its operations department to correct conditions in such plants (289a) and that the lease between Gulf and its franchise operator required Gulf to repair all structural defects (313a). The plaintiffs' architect expert witness (416a) testified that it was customary for the owner of the premises to send an architect or someone to the building to inspect it for sufficiency before installation work of the type here involved was given out (418a, 424a, 444a-445a).

Gulf knew that Beaman was not qualified to do construction or installation work in New York City, that Beaman was not familiar with this City's practices and that Beaman would subcontract out that phase of the Gulf agreement (274a, 278a) to United Porcelain Co., Inc. (hereinafter called U.P.) (283a-284a). The Gulf inter-office communication in Plaintiffs' Exhibit 7 recites this fact. Thus, it was accepted that the only work actually to be done by Beaman under the Gulf contract was to manufacture and deliver the material to the site (278a). In accordance with its long existing agreement with U.P., Beaman sent its own work order to U.P., together with the purchase order papers, specifications and plans it received from Gulf (337a-338a, 339a, 340a, Plaintiffs' Exhibits 7 and 8). Beaman's vice-president clearly stated that U.P. was only engaged to make the installation according to specifications and not to do anything about the roof or coping (345a-346a). By Beaman's work order U.P. was to do the job in a workmanlike manner (Plaintiffs' Exhibits 7 and 8). Beaman never instructed U.P. on how to install the lights or do its work, what precautions it was to take or whether it could operate on the roof to perform the job (339a, 655a). Since Beaman had not been informed by

Gulf of any unsafe condition of the building, it gave no information to U.P. on the subject (339a, 347a, 356a). However, if a dangerous condition were to have been reported to Beaman by either Gulf or by U.P. on their own inspection, Beaman's witness stated it would have acted accordingly (353a, 356a). Beaman provided no scaffolding to U.P. and never made any suggestion as to the use of any scaffolding (659a). When Beaman itself does the installation, it always instructs its men to use scaffolding and Beaman's engineer said he never saw light fixtures installed from an overhang of this type from the roof, although he conceded it was possible to do so (655a-656a).

U.P.'s witness, Salvatore Caso, testified that U.P. was an experienced porcelain installation contractor and had competent sheetmetal workers in its employ (359a, 360a, 366a, 368a). In this instance, the witness said, it received the purchase order papers from Beaman to erect and install the siding and overhang according to specifications (362a-363a) and it dispatched the two experienced plaintiffs to do the job according to the purchase order (364a, 365a, 368a, 370a). U.P. gave its men tools and two "A" shaped trestle ladders with extensions, together with planking (368a, 374a-375a) but it did not assign any foreman (371a). U.P.'s witness said that U.P. normally never made an inspection before working on this type job (364a). U.P. would normally rely on Gulf to inspect the building and see that the coping was secure (364a). The witness said that neither Gulf nor Beaman requested U.P. to inspect the roof or coping here (363a-364a).

Joseph James, whose corporation was franchise operator of the service station in issue under a sub-lease with Gulf (618a), testified that under the lease Gulf did all the work of and had the responsibility for maintaining and repairing the station (623a). The witness had previously complained to Gulf that the premises were run down, compared to other stations (625a).

The Beaman material, consisting of the siding, overhang, wall and triangular brackets, braces and other items and plans, was already at the site when the plaintiffs arrived (384a). The first thing McLean did was to examine the lighting plan and material list found in the material packaging to determine where the items were to be installed (395a, 398a-399a). Next, as was their usual procedure, they hoisted all the material up to the roof to get it out of the way (390a, 391a, 399a, 563a).

The procedure of installation went as follows:

First the two "A" frame ladders were set up with a platform plank resting on their rungs and suspended between them. The plaintiffs mounted the ladder platform and, in accordance with the plans, they drove a series of holes in a vertical line into the brick wall, each line of holes being 40 inches apart (392a, 393a-394a, 513a). Into these holes metal plugs were driven and tamped (394a, 563a). Over the line of plugged holes, metal slabs or wall brackets three to four inches wide and an inch thick were attached by rivets rammed through the brackets into the plugged holes (514a-516a, 517a). To these wall brackets the porcelain siding sections were attached. As per specifications, the brackets extended to within one foot of the roof (471a, 517a). To the upper end of the wall brackets, the triangular brackets were attached with about six driven rivets (394a, 517a, 518a-519a). These triangular brackets were the supports for what, in effect, was to be the overhang or canopy for the siding and for the housing for the lighting which was to illuminate the siding (392a, 393a-394a). These triangular brackets extended above the top of the parapet of the wall which rose about three feet above the roof floor (403a). Metal sheeting or decking was laid across these triangular brackets and riveted to them to accomplish a roofing for the canopy or overhang (392, 396a, 401a). Along the outer edge of the tri-

angular brackets a fascia was bolted. On the inner side of the fascia was the housing for the electrical fixtures (401a, 531a-532a). All of the siding had been put in with the plaintiffs operating on the "A" frame ladders and plank arrangement (513a). No one remembered whether the fascia at the edge of the triangular brackets was bolted in with the plaintiffs using the ladder planks or if they did this from the roof (601a-602a), but it was conceded that most times this item was put up with the ladders (603a). The triangular brackets extended out approximately 30 inches from the face of the wall (406a, 509a, 547a, 579a-580a).

All of the above had been completed at the time of the accident with the exception of the installation of the lighting fixtures (404a). Each of these fixtures weighed between sixty and seventy pounds and was about eight feet long (391a, 512a-513a).

Although the plaintiffs' employer, U.P., supplied the two eight-foot long "A" ladders with the six-foot extensions together with the plank up to the jobsite, it did not provide them with any scaffold (510a). Yet, their boss at U.P. instructed the plaintiffs not to use the ladders and plank to install the light fixtures because it was too dangerous (391a-392a). According to the plaintiffs, the only way they could perform this facet of the job was to place a strip of wood on the overhang cover to distribute the weight, extend their body out about fifteen inches beyond the edge of the wall and reach with the fixture out, over and around the outside of the fascia and up into the housing (405a, 509a, 532a-534a, 579a-584a). Plaintiff Linfante said he used scaffolding most times in this operation (597a). The plaintiffs' expert stated that it would be unsafe and dangerous for the plaintiffs to have used this "A" ladder arrangement to install the fixtures since it had no safety railings (454a-455a).

U.P. knew that the plaintiffs' expertise was limited basically to experience as sheetmetal workers who worked with their hands and climbed ladders and who did not necessarily work on roofs (367a-368a). U.P. did not tell its employees to make any inspections or tests of the building (400a). Neither plaintiff had any engineering competence and they were not independent contractors for U.P. (364a-365a). The plaintiff McLean testified that he had seen that the coping at the upper edge of the wall consisted of concrete sections in slabs twelve inches wide, four feet long and three inches thick, so that, when attached as they were to the side of the wall, they protruded out from its face for three inches (402a-403a, 407a, 518a). McLean said that, although the triangular bracket for the overhang is riveted to the wall brackets, he sometimes also drives rivets through it into the coping in order to give it more support (518a-520a, 523a). However, he testified that he did not remember whether he did that on this occasion (521a-523a). Exhibit 14G shows rivet holes in the coping. Beaman's engineer so testified and the blueprints show that no rivets were to be driven into the coping (Plaintiffs' Exhibits "7" and "8", 663a). Plaintiffs' architect expert, from his post-accident inspection, confirmed McLean's testimony to the extent that he observed that the facade on the outer side of the building's coping did consist of concrete slabs but, he said the coping extended two inches out from the wall (420a-421a, 428a-429a). The photographs in evidence demonstrate that these attached facade concrete slabs did protrude from the face of the wall of the service station. Beaman's engineering witness testified that the building plans show a coping flush with the wall and do not indicate a protruding facade attached to it (663a).

While the two plaintiffs were engaged in installing the light fixtures as above described, plaintiff McLean testi-

fied that both the roof and coping plus part of the overhang caved in under them (405a-406a). After falling, he looked back to see the coping down from part of the building toward the end where he had been working (407a). Joseph James, who witnessed the accident, said that the entire installation and three of the bricks from the building came down with the plaintiffs (622a, 629a). Plaintiff Linfante stated that everything went down with the collapse (564a). The plaintiffs' architect expert who inspected the site in the first week of August (418a) said that he observed seven feet of the parapet missing (422a). The responding police officer reported that the accident occurred when part of the coping gave way (153a).

The plaintiffs' expert gave the opinion from his inspection of the building after the accident that the accident was the result of a section of this coping having been loose before the plaintiffs kneeled on it (432a). He also stated, and this is obvious from reading Plaintiffs' Exhibits "7" and "8", that the plans prepared on behalf of Gulf do not show any protruding coping on the top of the subject wall or even whether the wall had coping at all (423a, 447a). This expert further testified that it would be foolish and negligent for a person to lie entirely on the overhang (456a-457a, 458a-459a, 473a).

Beaman's engineer witness testified that the light fixtures should have been installed with a scaffold from below the overhang (650a). He also said that the proper riveting of the triangular brace to the wall base would allow the item to withstand a 40-pound dead weight and a 30- to 40-pound live weight per square foot (657a). Accordingly, he said that there would be no danger of collapse of the overhang if the two plaintiffs stood on the overhang at once, provided it was installed with the rivets driven in properly according to plans (665a-666a).

When U.P. rested and moved for a dismissal, the Court ruled that the jury could find from the evidence that U.P. did not give the plaintiffs instructions on how to act and was therefore negligent (635a, 637a, 638a). The Court also denied Beaman's motion on the holding that as general contractor it was chargeable with Gulf's knowledge, since its name was on the plans (639a, 640a, 641a).

The Court dismissed Gulf's cross-complaint against Joseph James, Inc. on the holding that there was no negligence on James' part and the hold harmless clause was unenforceable as contrary to public policy (611a-616a, 667a).

At the close of the evidence Gulf moved for judgment on its third-party complaint against Beaman on the contention that the hold harmless clause running to Gulf's favor in the work order agreement afforded it absolute indemnification (668a-669a). The Court denied the motion, ruling that this provision in the contract indemnified Gulf only for improper work (669a).

The Court clearly charged that Gulf could not be held liable to the plaintiffs for any negligence of its contractor's employees in the manner in which they performed the work (737a).

The Court described the plaintiffs' contention to the jury as claiming that they were given defective plans requiring them to exert weight on an ornamental coping not intended for that purpose and that they were only following the instructions in the plans (733a-734a). The Court stated Gulf's position to be that the plaintiffs' accident resulted from the negligent manner they did their work in attaching the triangular brackets to the building, their negligence in placing their weight on the overhang (734a, 736a), and their failure to observe the obvious condition of the coping (734a, 736a).

The Court instructed the jury that if it found that the plaintiffs failed to follow the plans given them or that plaintiffs were not warranted in following the plans because they were obviously inadequate or that plaintiffs should have known that putting their weight on the coping was a foolish thing, they would be contributorily negligent (736a-737a). On the other hand, the jury was told that Gulf should be found negligent if it was determined that Gulf had a duty from its knowledge of the blueprints to warn plaintiffs from doing the work in a negligent manner (738a).

On Gulf's third-party complaint against Beaman, the Court clearly ruled that the purported contract of indemnification was *ambiguous* (739a). It left to the jury the issue of whether the words "in connection with the work" in the hold harmless clause rendered it inapplicable against Beaman if Beaman slavishly followed the blueprints (740a).

As between Gulf and Beaman, the jury was given the question of whether Beaman prepared the plans and was otherwise responsible in common law indemnity to Gulf for any liability it incurred to the plaintiffs (766a).

As to Gulf's and Beaman's claims for indemnity against U.P., the issues were defined as follows: Whether U.P. owed a duty to Gulf and Beaman to see that the contract was performed in a workmanlike manner, whether it should have made an independent inspection of the building for safety (610a, 611a, 741a), and whether U.P. should have provided plaintiffs with scaffolding (767a-768a). The Court noted on colloquy addressed to the charge that U.P. had the duty of having told plaintiffs what to do and of providing proper tools before they went on the job (764a-765a).

Gulf and Beaman excepted to the Court's failing to charge that U.P. had an independent duty to properly instruct its employees, the plaintiffs (748a, 752a).

Gulf and Beaman excepted to the Court's refusal to charge that U.P., not Gulf or Beaman, had the sole duty to provide scaffolding under Section 240 of the New York State Labor Law (758a-759a, 763a). Beaman also excepted to the charge that Beaman had a duty to supply scaffolding for its subcontractors' workers (762a-763a).

The jury found in favor of the plaintiffs against Gulf and allocated the proportion fault as 35% for Gulf, 35% for Beaman and 30% for U.P. The jury also found that Gulf was entitled to contractual indemnification from Beaman on its hold harmless agreement (789a-790a).

Upon the motions of all sides to set aside the verdict (792a-793a), the Court expressed doubt as to the verdict of Gulf against Beaman and U.P. but expressed agreement with plaintiffs' verdict against Gulf (796a-797a).

On its ruling on the formal post-trial motions, the Court held that the evidence showed that U.P. performed no function other than to supply labor to do the installing (802a). It also held that the plans which both Beaman and Gulf had before U.P. started work would have revealed by review of any competent professional that they were inappropriate for this type of installation on this type of building (804a) and that the blueprints did not signal the problem (804a). Further, the Court held that U.P.'s employees followed the blueprints *as best they could* by driving rivets into the ornamental coping (804a). The Court also reasoned that no basis of U.P.'s negligence can attach from its failure to supply scaffolding, since the coping and overhang collapsed under the plaintiffs and they did not fall off it, as would be the only basis for contending that lack of scaffolding caused the

accident (805a). Further, the Court noted that there had been no prior practice to use scaffolds and Beaman had not requested U.P. to use them (806a). The Court ruled that no negligence of U.P. caused the accident. Accordingly, it reversed the jury verdict and dismissed the indemnity actions against U.P. (806a).

Finally, the District Court ruled, as a matter of law and in reliance upon the jury verdict against Beaman, that its holding that U.P. performed the installation aspect of the Gulf contract properly afforded no basis for a similar holding that as to Beaman the same work was properly performed (805a-806a). Therefore, it denied Beaman's post-trial motion for a dismissal of Gulf's third party complaint against it or, in the alternative that it receive 100% indemnity against U.P. (801a, 806a).

The provision of the Gulf—Joseph James Inc. contract upon which Gulf's claim over for contractual indemnification is based reads as follows:

> "7. Lessee agrees to exonerate, save harmless, protect and indemnify Lessor from any and all loss, damages, claims, suits or actions, judgments and costs which may arise or grow out of any injury or death of any person or persons or damage to any property caused by or in any manner connected with the use, possession, repair or condition of said premises or any equipment or fixtures thereon."

The provision of the Gulf contract with Beaman on which Gulf relied for contractual indemnification from Beaman reads as follows:

> "13. In case of entry by the seller or any of seller's agents or employees upon the property or premises of the purchaser, for the purpose of construction, erection, inspection or delivery under the

order, the seller agrees to provide all necessary and sufficient safeguards and take all proper precautions against the occurrence of accidents, injuries or damages to any persons or property, and to be responsible for and to indemnify and save harmless the purchaser from all loss or damages and any and all claims by reason of accidents, injuries, including death, or damages to any persons or property in connection with such work or from all fines, penalties or loss incurred by reason of the violation of any law, regulation or ordinance, and further agrees to defend at the seller's expense, any and all suits or actions, civil or criminal arising out of such claims or matters and further agrees to procure and carry public liability and property damage insurance with contractual liability endorsemen and such insurance of employees as may be required by any workmen's compensation act or other law, regulation or ordinance, which may apply in the premises."

POINT I

The judgment to the extent that it granted Gulf contractual indemnification against Beaman has no legal foundation.

It is established law in the State of New York that only the Court has the responsibility and jurisdiction to construe the terms of a contract where their meaning is clear and unambiguous.

> "The construction of a plain contract is for the court. The intention of the parties is found in the language used to express such intention. *Hartigan* v. *Casualty Co. of America,* 227 N.Y. 175. If the

> Court finds as a matter of law that the contract is unambiguous, evidence of intention and acts of the parties play no part in the decision of the case. Plain and unambiguous words, undisputed facts, leave no question of construction except for the court. The conduct of the parties may fix a meaning to words of doubtful import. It may not change the terms of a contract." *Brainard* v. *New York Central Railroad Co.*, 242 N.Y. 125, 133 (see also *Nau* v. *Vulcan Rail and Constr. Co.*, 286 N.Y. 188, 198, 199)

In the ordinary contract where the language is ambiguous or equivocal, it becomes a mixed question of law and fact to determine the intent based upon the wording of the document read in conjunction with the conduct of the parties to the agreement and surrounding circumstances (*Battle Brand Products Inc.* v. *Consolidated Edison of New York, Inc.*, 31 Misc. 2d 181, 182). However, the Courts of the State of New York have unalterably ruled that in the instance of provisions of absolute indemnification in contracts, there can be no recourse to collateral evidence or factual interpretation. The judicial decisions hold that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms. (*Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N.Y. 36, 43). Although the New York Court of Appeals has decreed in *Kurek* v. *Port Chester Housing Authority*, 18 N.Y. 2d 450; *Levine* v. *Shell Oil Co.*, 28 N.Y. 2d 205, and subsequent cases, that stylized or ritualistic language in the contract, previously mandated for an enforceable hold harmless agreement, is no longer required, it still retained the necessity for unequivocal and unambiguous meaning in the contract expressing such unmistakeable intent of the parties.

> "As to contractual indemnity, there is a different rule. It has long been recognized that a party may

> not protect itself from losses resulting from liability for negligence by means of an agreement to indemnify. The rule is restricted to the extent that indemnity provisions will not be construed to indemnify a party against his own negligence unless such intention is expressed in unequivocal terms (Eg. *Kurek* v. *Port Chester Housing Authority,* 18 N.Y. 2d 450)." *Margolin* v. *New York Life Insurance Company,* 32 N.Y. 2d 149, 153.

During the trial of this action the Court affirmatively ruled in response to a motion by Gulf for a directed verdict that paragraph No. 13, above recited, only provided indemnification to Gulf by Beaman for improper performance of the work (669a). The Court went further. It specifically ruled in its charge to the jury that this purported indemnification agreement was *ambiguous* (739a-740a). The District Court's holding that there was a lack of clear intent in paragraph No. 13 of Gulf's work order to impose absolute indemnity for any phase of the contract other than the negligent performance of the work, is supported by the plain reading of this provision since it only related to Gulf's liability connected with, and after entry upon the property by the contractor for the purpose of, the work itself. It is submitted that the District Court's construction should not be disturbed since any uncertainty in the meaning of the contract must be resolved against Gulf who prepared it (*Gillet* v. *Bank of America,* 160 N.Y. 549, 554; *Rentways, Inc.* v. *O'Neill Milk and Cream Co.,* 308 N.Y. 342, 348). Especially is this so since Beaman's contract proposal left to Gulf the elimination of structural obstructions before the installation work commenced (Plaintiffs' Ex. 7 and 8).

> "Even construing the indemnity agreement in such a manner as to give the third-party-plaintiff the benefit of every doubt as to its meaning, it is difficult to see how the parties intended to hold the

> contractors answerable for a liability arising out of a dangerous condition existing prior to the making of the contract." *Donnelly* v. *Rochester Gas & Electric Corporation,* 44 Misc. 2nd 855, 863.

Accordingly, it is forcefully contended that the District Court erred in giving the issue of whether Gulf's contract could be construed to allow Gulf absolute indemnification against Beaman. Rather, the Court should have completely disregarded this contract as a matter of law as not complying with New York State standards for imposing absolute contractual indemnification, at least as to that element of Gulf's exposure to liability for the occurrences prior to the commencement of and in connection with the actual work in which plaintiffs were injured.

Gulf was the only direct defendant in this action. The District Court clearly charged the jury that Gulf could not be held liable for the manner of performance of the work by its contractors' employees (737a). The sole exposure of Gulf to a verdict against it according to the charge was limited to a finding of its negligence arising out of its failure to warn of the danger after knowing idiocyncracies of the construction of this building from its knowledge of the original construction plans, its review of the plans for this job and their incompatability with the structure (737a-739a). The plaintiffs' contention, too, as framed by the Court for the jury, was that Gulf furnished defective plans resulting in the accident (733a-734a). This also limited the issue of Gulf's fault to developments occurring prior to the commencement of plaintiffs' work on its service station. Implicit in the jury's verdict in favor of the plaintiffs against Gulf was the finding that plaintiffs themselves committed no negligent acts related to their accident during the course of their actual execution of the work and that Gulf was responsible for a known pre-existing weakness in its station of which it did not

warn plaintiffs and for supplying them with inadequate plans and specifications.

Therefore, no matter what decision this Honorable Court might make concerning the propriety of Gulf's judgment against Beaman on common law indemnity, that facet of the judgment which awards Gulf total and absolute contractual indemnification should be reversed and that cause of action should be ordered dismissed as contrary to the law, facts and the correct pre-verdict rulings of the District Court.

POINT II

The District Court erred in setting aside the jury verdict and dismissing Beaman's third-party complaint against United Porcelain.

The evidence on trial shows that the Gulf work order and specification was delivered by Beaman to U.P. before it started work (337a-338a, 339a-340a, Plaintiffs' Exhibits "7" and "8"). The Beaman work order to U.P. admittedly called upon U.P. to install the siding and overhang (345a-346a) but it expressly required U.P. to do the job in a workmanlike manner (Plaintiffs' Exhibits "7" and "8"). U.P. relied entirely upon Gulf as to the safety of the structure (324a-325a, 347a) and Beaman provided no tools or equipment and gave no direction as to the manner in which U.P. was to perform its work or as to any precautions U.P. was to take in the execution of the installation phase of the contract (339a, 356a). There was testimony that U.P. did not provide scaffolding for its men (510a). Yet, U.P. told the men not to use the ladders it provided to install the light fixtures as being too dangerous (391a-392a), thus, requiring them to do the installation from on top of the overhang. U.P. did not afford its men, who had limited ability only to work with

tools (367a-368a), with a foreman (371a). U.P. did not warn or instruct its men as to making any tests or inspections for their own safety (400a). These men drove rivets into the facade of the coping as seen from photograph (14G). Plaintiffs' expert testified that the light fixtures should have been installed from underneath the overhang (650a). Plaintiffs' expert gave the opinion that the ornamental coping extending out from the face of the station's wall was loose before the work began (432a). Plaintiff McLean saw the coping protruded three inches from the wall face (402a-403a, 407a, 517a). Yet, the plans and blueprints showed a coping flush with the wall (663a, Plaintiffs' Exhibits "7" and "8"). Therefore, it could have been determined that the plaintiffs should have known, if U.P. had inspected the site and had instructed them, that the installation obviously could not have been made according to plans.

This as well as the other evidence supported a finding that U.P. had not performed its obligations to Beaman and Gulf in a workmanlike manner under its independent contract. The contractor employer owes an independent duty to its principal to provide its employees with a reasonable place to work in its own job site (*Burris* v. *American Chicle Co.*, 120 F. 2d 218, 222 [2nd Cir. 1941]; *Lindgren* v. *Tugboat Dalzellable Inc.*, 25 A.D. 2d 683). The contractor U.P. had the primary obligation for the manner of performance of the work by its employees and for the sufficiency of its employee's tools and equipment (*Employer Mutual Insurance Company of Wisconsin* v. *DiCesare & Monaco Concrete Construction Corporation*, 9 A.D. 2d 379, 383, 384). Under wording of Section 240 of the Labor Law of the State of New York existing at the time of this accident and under the judicial interpretation of it, the contractor alone was responsible for supplying its workers with adequate scaffolding and ladders (*Komar* v. *Dun & Bradstreet*, 284 App. Div. 538; *Olsommer* v. *Walker*, 4 N.Y. 2d 793).

After U.P. rested and moved for a dismissal, the District Court denied its dismissal motion on the ruling that there was evidence that U.P. had not properly instructed its employees (635a, 637a, 638a). The Court charged the jury that it could find from the evidence that U.P. did not perform its contractual obligations in a workmanlike manner, it had a duty to make a pre-work inspection which it did not perform (741a, 742a) and it did not provide adequate scaffolding as required (766a-767a).

The fact that the jury verdict in favor of the plaintiffs in their action against Gulf was based on a finding that they were free of negligence considering their circumscribed expertise and the material and circumstances under which they had to work, did not preclude the jury from also determining from the evidence that U.P.'s fault in failing in its independent duty to Beaman and Gulf to provide scaffolding, instruct its men, conduct a pre-work inspection and in otherwise not arranging to do its job in a workmanlike manner contributed to the accident. Under the law of *Dole* v. *Dow Chemical Company,* 30 N.Y. 2d 143, even though Gulf violated its duty to the plaintiffs to warn and provide a safe structure, it and Beaman were entitled to indemnification from U.P. for any liability they incurred in this action in proportion to U.P.'s fault in not performing its duties under the contract.

After the jury returned a verdict against U.P. which duly found upon the evidence and the charge that its fault contributed to the accident to the extent of 30%, the Court rationalized that since the overhang and coping collapsed under the plaintiffs and they did not fall off it, there was no proximate causal relation between U.P.'s failure to provide scaffolding and the accident. It is submitted that this is erroneous reasoning since "but for" the absence of scaffolding here, the accident would not

have occurred. However, in addition to the matter of scaffolds, the other issues on which U.P.'s negligence could be found, as supported by proof and the charge given to the jury, more than adequately justified the jury's verdict.

The District Court has no right to upset a jury verdict which is supported by evidence and rendered on a proper charge no matter what its opinion or belief to the contrary.

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944). (See also *Lavender* v. *Kurn*, 327 U.S. 645, 653 [1946]).
>
> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. *Arnold* v. *Panhandle & S.F. R. Co.*, 353 U.S. 360. Cf. *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 446." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 364.
>
> "However much a trial or appellate court may disagree with a jury verdict, if the verdict is one which reasonable men could have rendered after reviewing conflicting evidence, the Court may not substitute its personal judgment in place of the verdict (cases cited)." *Triggs* v. *Advance Trucking Corp.*, 23 A.D. 2d 777, 778.

This part of the judgment should be reversed and at least the 30% finding of liability on the part of U.P. should be reinstated.

POINT III

The dismissal of Gulf's cross-complaint against Joseph James Inc. was incorrect.

Since the dismissal of Gulf's cross-complaint against Joseph James Inc. has a direct effect of the amount which Beaman will potentially have to pay Gulf on this judgment, it is submitted that Beaman is an aggrieved party by the Court's ruling on this subject.

According to *Levine* v. *Shell Oil Company*, 28 N.Y. 2d 205, the wording of the lease between Gulf and the franchise-lessee-operator of the accident service station spells out absolute contractual indemnification. The hold harmless agreement is unequivocal and clearly affords Gulf indemnity from Joseph James Inc. in this action.

The Court apparently held that the Gulf-James indemnification agreement was contrary to public policy in the light of Section 5-322 of the General Obligations Law. Such a determination has no foundation in law. A simple reading of this section shows that its only purpose is to outlaw clauses in leases which exculpate the landlord from any liability for damages incurred by the tenant in his use of the rented premises. It has no bearing whatever where the lease provision does not excuse the landlord from liability to the other party to his contract but, rather, as here, it provides for contractual indemnification from the tenant where a landlord is held liable to a third person not privy to the lease. It was so held in *Hershkowitz* v. *Menorah Caterers, Inc.*, 72 Misc. 2d 199. Also in

614 Third Avenue Corp. v. *Grand Iron Works Inc.*, —— A.D. 2d ——, 353 N.Y.S. 2d 458, 459 the Appellate Division, First Department in March of 1974 in deciding on the sister statute, General Obligations Law §5-323, said that an indemnity provision does not contract away liability as contemplated by the section.

> "The subject contract is one indemnifying an owner for the latter's negligence and does not fall within the statute."

Levine v. *Shell Oil* itself decided the same type of indemnification as under parallel circumstances now before the Court and did not refuse to enforce it as against public policy.

There was no justification for dismissing Gulf's cross-complaint against Joseph James Inc. Since it was the sole province of the Court to grant judgment over to Gulf as a matter of law on this hold harmless agreement, this Court is respectfully requested to reverse this aspect of the judgment, set aside the ruling of the District Court and direct the judgment in favor of Gulf which should have originally been ordered.

POINT IV

The District Court materially erred in making an issue of Beaman's common law indemnity to Gulf without proof to support it or in denying Beaman's motion for total indemnity against United Porcelain.

1. The building on which this accident occurred was erected for Gulf and Gulf approved the plans therefor (216a, 222a). The evidence unequivocally shows and the Court later held (804a footnote) that Gulf was clearly

chargeable with knowledge of the structure make-up of its own building.

By the admission of Gulf's own employees, Gulf hired the architect, had the plans prepared for this job by him on Gulf's behalf and Gulf had the plans filed and the permits for the work obtained (267a, 275a, 281a). Gulf's witness conceded that it was normal for Gulf to have examined the plans before letting out any work for the siding of this service station (240a, 268a). The contract papers between Gulf and Beaman explicitly provided that Beaman was only to do field measurements and that Gulf was to eliminate any structural obstructions to the work (Plaintiffs' Exhibits "7" and "8"). A reading of the plans prepared by Gulf's architect shows that there was no protruding ornamental coping on this service station (Plaintiffs' Exhibits "7" and "8"). The same was testified to by Beaman's engineer (663a). It was known by Gulf that Beaman was not an authorized construction contractor in New York, and that it was not familiar with New York procedures (274a, 278a, Plaintiffs' Exhibits "7" and "8"), that it would have to sub-contract the installation phase of the job (283a-284a) and that Beaman actually would only manufacture and deliver the material to be installed by U.P. (278a). Gulf's employee admitted and plaintiffs' expert testified that it was Gulf's responsibility to conduct the inspection of the premises for structural incompatability with the plans or unsafe condition (240a, 418a, 424a, 444a-445a). Gulf also admitted it made no pre-work inspections (240a, 256a, 260a, 261a-263a). It is conceded that it could be found that Beaman drew a blueprint from the plans which Gulf's architect had prepared and forwarded to Beaman. However, Gulf's architect thereafter reviewed, approved, signed and stamped his seal on this blueprint before filing it for the permit and forwarding it back to Beaman (647a-648a, Plaintiffs' Exhibits 7 and 8).

As is apparent, this evidence comes for the most part from the third-party plaintiff Gulf's own employees and the balance recited above is not controverted by Gulf or any other party to the action. It should, therefore, have been accepted on its face.

> "Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and is not opposed to the probabilities; nor, in its nature surprising or suspicious, there is no reason for denying to it conclusiveness." *Hull* v. *Littauer,* 162 N.Y. 569, 572.

It must be remembered that plaintiff did not sue Beaman. It was impleaded by Gulf. By the Court's own charge and on existing law, neither Gulf nor Beaman could be held liable for the manner in which plaintiffs conducted their work. Therefore, Beaman's liability to Gulf could only evolve from some violation by Beaman of the terms of its contract with Gulf which cast Gulf in liability to the plaintiffs (*Tipaldi* v. *Riverside Memorial Chapel,* 273 App. Div. 414, 419 aff'd 298 N.Y. 686). There is not the slightest indication from any of the evidence that Beaman violated any provision of its contract. Nor can it be vaguely inferred from the proof that Beaman created the condition which caused plaintiff's accident. These would be the only grounds upon which Gulf would be entitled to indemnity against Beaman (*Brown* v. *Knickerbocker Village,* 30[illegible] N.Y. 964, 966 affd. 279 App. Div. 1043; *Paranzino* v. *Yonkers Raceway, Inc.,* 9 Misc. 2d 378, 380, App. Term, 1st Dept.). Although it is true that while Beaman played a part in the sequence of events leading up to the accident, there is no evidence it improperly fabricated any of the parts to be installed or that it deviated in the slightest way from the contract

provisions which it had with Gulf. Just because Beaman contractually stood in between the owner and the construction sub-contractor does not couch it in liability for the prior knowledge of Gulf or the pre-existing latent dangerous condition of its building without some proof of contractual or tort fault on its part--and there was no such proof (*Thompson-Starret Co.* v. *Otis Elevator Co.*, 271 N.Y. 36, 41). The Court should have dismissed the common law indemnification cause of action brought against Beaman by Gulf as completely unsupported by the weight of the evidence in response to Beaman's motions made therefor before the case was given to the jury (639a, 640a, 641a) and in answer to Beaman's post-trial motions to set aside that aspect of the verdict.

2. Conversely since the evidence categorically establishes that Beaman sub-contracted its entire responsibility for installation under the Gulf contract to UP and took no part in its performance, under the law of New York Beaman should have been entitled to 100% indemnity against UP for any liability it might have incurred by UP's fault (*Rogers* v. *Dorchester Associates*, 32 NY 2d 553, 565-566; *Haman* v. *Humble Oil & Refining Co.*, 34 NY 2d 555). Therefore, Beaman's post trial motion for such relief should have been granted in the alternative.

POINT V

The District Court otherwise erred in its rulings and charge so as to deprive Beaman of a fair trial.

The District Court refused to charge that the exclusive responsibility for supplying scaffolding to the plaintiffs, its employees, was on UP under Section 240 Labor Law of the State of New York (758a, 759a, 763a). The Court

also insisted upon instructing the jury that it could find that Beaman had a duty to supply scaffold to UP's workmen (762a-763a). This is contrary to the law of the State of New York in existence at the time of plaintiffs' accident (*Komar* v. *Dun & Bradstreet,* 284 App. Div. 538; *Olsommer* v. *Walker,* 4 N.Y. 2d 739). The verdict against Beaman could very well have been based upon a finding that Beaman did not fulfill a responsibility to supply scaffolding.

Despite the fact that the Court had earlier ruled that there was evidence to sustain a finding that UP had not properly instructed its employees for their work on this job (636a, 637a, 638a), it failed to charge the jury on that issue, to which Gulf and Beaman excepted (748a, 752a).

It is contended that Beaman was deprived of a fair trial on the claim against it and its third-party claim against UP by the elimination of those valid issues from the consideration of the jury.

> "The Trial Court improperly limited the issues presented by the pleadings in this action and, in our opinion, thereby deprived the plaintiff of a fair trial." *Tuesdale* v. *Dueger,* 3 A.D. 2d 985.

Even after the perceptive jury determined UP's fault on the limited charge and the District Court found in its decision on the post-trial motion of UP that the job obviously could not be performed properly and safely with the plans and specifications prepared by Gulf which UP received and should have recognized on professional examination, so that UP's employees were left to improvise "as best they could" (804a-805a), the Court still persisted in holding on its post-trial order that UP had not breached its duty of workmanlike performance and that its duty

was complete when it provided two competent sheet metal workers to perform its contract with Beaman (805a-806a). Thus, the Court contradicted the jury verdict and ruled that UP had performed its work under the contract properly. However, on Beaman's post trial motion made on the same reasoning as set forth by UP, the Court summarily relied on the jury's verdict against Beaman, which was only the conduit of the contract to UP, to support its determination that Beaman's workmanship was defective and that, therefore, its liability to Gulf and its deprivation of indemnity from UP was established (806a-807a). It is respectfully submitted that such a conclusion is inconsistent and fallacious and cannot support a judgment against Beaman.

CONCLUSION

The judgment appealed from should be reversed and an order should be entered directing:

1. **The dismissal of Gulf's contractual indemnity claim against Beaman;**
2. **Directing the entry of judgment for contractual indemnity in favor of Gulf against Joseph James Inc.;**
3. **Directing the dismissal of Gulf's common law indemnity claim against Beaman, or, in the alternative,**
4. **Directing judgment for total common law indemnification of Beaman against U.P. for any liability of Beaman under the final judgment, or, in the alternative,**
5. **Directing the restoration of that aspect of the judgment on the jury's verdict which held U.P. liable for 30% of the plaintiffs' damages herein.**

Respectfully submitted,

COPPOLA & D'ONOFRIO
Attorneys for Third-Party Defendant-Appellant Beaman Corporation

WILLIAM F. LARKIN
Of Counsel.

of Service by Mail. The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

States Court of Appeals for the Second Circuit

mes V. McLean, Ethel McLean, Joseph Linfante and
san Linfante, Plaintiffs-Appellees,
against
P.W. Realty Company, Lawrence Paul Wolf, defendants
lf Oil Corporation, and Joseph James Defendants-
Appellees-Appellants
---
lf Oil Corporation, Third Party Plaintiff-
Appellant -Appellee

AFFIDAVIT OF SERVICE BY MAIL

New York, County of New York **ss.:**

rnard S. Greenberg , **being duly sworn deposes and says that he is**
ent for William F. Larkin **the attorney for the above named**
pellant Beaman Corp. **herein. That he is over 21 years**
not a party to the action and resides at 162 East 7th Street, New York
w York.

the 31st **day of** July , 19 74 , **he served the within**
Brief for Third Party Defendant-Appellant Beaman Corp.
upon Furey & Mooney
for the above named Appellant Gulf Oil Corporation,

ting 3 true copies **of the same securely enclosed in a post-paid wrapper**
ost Office regularly maintained by the United States Government at
h Street, New York, New York

o the said attorneys for the Appellant Gulf Oil Corporation
600 Front Street Hempstead 11550

at being the address within the state designated by th em for that purpose, or the
ere they then kept an office, between which places there then was and now is a regular
cation by mail.

before me, this 31st
July 19 74

Bernard S. Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals
For the Second Circuit

James V. McLean, Ethel McLean, Joseph Linfante and Susan Linfante, Plaintiffs-Appellees,
against
L. P. W. Realty Company, Lawrence Paul Wolf, defendants,
Gulf Oil Corporation, Defendant-Appellant,
Joseph James, Inc., and Joseph James,
Defendants-Appellees-Appellants
O-----O
Gulf Oil Corporation, Third Party Plaintiff-Appellant-Appellee

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Bernard S. Greenberg being duly sworn,

deposes and says that he is over the age of 21 years and resides at
162 East 7th Street, New York, N.Y.
That on the 31st day of July , 19 74
he served the annexed Brief for Appellant Beaman (3 copies)
Appendix (2 copies)
Exhibit volume(1 copy) upon

McNulty & McNulty of counsel to A. Allen Stanger
Attorney for Defendants-Appelles-Appellants,
Joseph James, Inc. and Joseph James,
10 Columbus Circle,
New York, N.Y.

Berman & Frost,
Attorneys for Plaintiffs-Appellees,
77 Water Street,
New York, N.Y. 10005

Alexander, Ash, Schwartz & Cohen,
Attorneys for Third Party Defendant-Appellee,
United Porcelain Co., Inc.,
801 Second Avenue,
New York, N.Y.

in this action, by delivering to and leaving with said attorneys the copies as specified above ~~xxxxxxxxxxxxxxxx~~ to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 31st day of July, 19 74

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4609705
Qualified in Delaware County
Commission Expires March 30, 1975

Bernard S. Greenberg